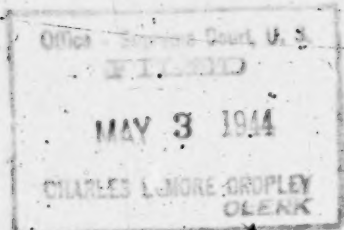


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 37

TOM TUNSTALL,

Petitioner,

vs.

**BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, OCEAN LODGE NO. 76, PORT NOR-
FOLK LODGE NO. 775, W. M. MUNDEN AND NOR-
FOLK SOUTHERN RAILWAY COMPANY.**

REPLY BRIEF OF PETITIONER.

CHARLES H. HOUSTON,
Counsel for Petitioner.

**JOSEPH C. WADDY,
OLIVER W. HILL,**
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 779

TOM TUNSTALL;

Petitioner,

**BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, OCEAN LODGE NO. 76, PORT NOR-
FOLK LODGE NO. 775, W. M. MUNDEN AND NOR-
FOLK SOUTHERN RAILWAY COMPANY.**

REPLY BRIEF OF PETITIONER.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

There was no lack of necessary defendants in this case.
All necessary parties were present before the Court.

All the respondents: Brotherhood of Locomotive Fire-
men and Enginemen, Ocean Lodge No. 76, Port Norfolk
Lodge No. 775, W. M. Munden and Norfolk Southern Rail-
way Company oppose the petition for a writ of certiorari on
the ground the Brotherhood is a necessary party defendant,
has not been served with process, and is not before the
Court. (See Brotherhood brief pp. 3-9; Railway brief pp.

1-2). Ocean Lodge also objects to the service of process (Brotherhood brief p. 7, R. 32).

The contentions of the respondents were denied by the United States District Court (R. 50), and ignored by the United States Circuit Court of Appeals in its opinion (R. 55) although the points were specifically raised in each court by respondents (R. 25-33; Brotherhood brief pp. 4-5; Railway brief, p. 2).

The facts on this matter are as follows: petitioner proceeded against the respondent Brotherhood of Locomotive Firemen and Enginemen not only directly in proper person (R. 2) but also under Rule 23 (a) of the Federal Rules of Civil Procedure (Appdx.) through its subordinate lodges: Ocean Lodge No. 76 and Port Norfolk Lodge No. 775, and its local representative, W. M. Munden, Local Chairman of Ocean Lodge No. 76 (R. 23, 24).

Process was served on Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and on the individual respondent Munden. No service was made on the Brotherhood as such (R. 53). The service of process on Ocean Lodge No. 76 was challenged (R. 32, 53-54). Service on Port Norfolk Lodge No. 775 and on respondent Munden was *not* challenged (R. 30-31). Therefore, the Brotherhood is before the Court under Federal Rules of Civil Procedure, Rule 23 (a) by service on at least two representatives.

The complaint specifically charged that petitioner was employed as a locomotive fireman on the Northern Seniority District of the Railway (par. 6, R. 4) and that his wrongful displacement occurred in said Seniority District (par. 6, R. 4; par. 10, R. 10). As to the respondents it charged:

3. The defendant, Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the Brotherhood) is an international unincorporated association whose membership is derived principally from white firemen and enginemen employed on interstate rail-

roads, including the Norfolk Southern Railroad and its successor in interest, the Norfolk Southern Railway; is the Representative under the Railway Labor Act, 1934, 48 Stat. 1185, U. S. C. Title 45, Chapter 8, of the craft or class of locomotive firemen employed on said Railroad and is sued as such. It is composed of a Grand Lodge and over nine hundred subordinate lodges, including the defendant subordinate lodges, which are too numerous to make it practicable to bring them all before the Court. The subordinate lodges are also unincorporated associations, each composed of numerous individual locomotive fireman, and it is likewise impracticable to bring them all before the Court. The Brotherhood has a national treasury derived from membership dues and otherwise. By constitutional provision, ritual and practice it restricts its membership to white locomotive firemen and enginemen. Plaintiff is excluded therefrom solely because of race."

"4. The defendants, Ocean Lodge, No. 76 and Port Norfolk Lodge, No. 775, are subordinate lodges of the defendant Brotherhood having their locations in Norfolk, Virginia, and Portsmouth, Virginia, respectively, within the jurisdiction of this Court. The business of each subordinate lodge is managed by a President, Recording Secretary, Legislative Representative, Local Organizer and Local Chairman. The members of the defendant subordinate lodges are either employed by the Norfolk Southern Railroad Company, and directly involved in the matters herein complained of, or are members of the defendant Brotherhood resident within the jurisdiction of this court. Upon information and belief plaintiff alleges that the defendant subordinate lodges constitute all of the lodges of the defendant Brotherhood within the territorial limits of the Norfolk Division of the United States District Court for the Eastern District of Virginia, and are truly and fairly representative of the remaining lodges of the Brotherhood and of the Brotherhood itself, and the interest of all the members, subordinate lodges and the Brotherhood will be adequately represented in the premises by

the defendants of record. The defendant subordinate lodges are sued as representatives of the membership, all the subordinate lodges and the Brotherhood itself."

"5. The defendant, W. M. Munden, is a white locomotive fireman employed by the Norfolk Southern Railroad and its successor in interest, the Norfolk Southern Railway; is a member of the defendant Brotherhood who, because of the wrongs inflicted by the Brotherhood upon plaintiff and his class, gained certain advantages and considerations which rightfully belong to plaintiff as hereinafter will appear more fully. He is local Chairman of defendant Ocean Lodge, No. 76, and acts for the Brotherhood in enforcing the schedule of rules and working conditions and in matters of grievance adjustments and job assignments on the Northern Seniority District of said Railroad. He is sued in his own right and as a representative of the members of the Brotherhood, particularly those employed on the Norfolk Southern Railroad and its successor in interest, the Norfolk Southern Railway Company" (R. 2-3).

Demonstrating that the action involves common questions of law and fact affecting the several rights and that a common relief is sought (Rule 23 (a-3)), petitioner charged in Count I that the wrongs complained of were inflicted upon him by the Brotherhood itself (R. 4), and reasserted the same fact with more elaboration in Count II (R. 6-12). The Brotherhood as an unincorporated association is the totality of its membership; hence the questions of law and fact affecting its action as against a nonmember must be common to all the members of the association.

Petitioner also brought a class suit on behalf of all the Negro fireman employed by the respondent Railway. He charged in Count II that

"1. * * * Said Negro firemen constitute a class too large to be brought individually before the Court, but

there are common questions of law and fact involved herein, common grievances arising out of common wrongs, and common relief for the entire class is sought as well as special relief of this plaintiff; and the interests of said class are fairly and adequately represented by plaintiff? (R. 5).

As part of the relief prayed, petitioner sought a declaratory judgment declaring the respective rights and duties of the Brotherhood as representative under the Railway Labor Act of the craft or class of locomotive firemen employed by the respondent Railway in respect to the members of said craft or class, including plaintiff and other minority firemen, nonmembers of the Brotherhood; a permanent injunction against the Brotherhood, its officers, agents or subordinate lodges, their officers and agents, restraining and enjoining them from purporting to act as the representative of plaintiff and the other Negro firemen under the Railway Labor Act so long as it or they, or any of them, refuse to represent him and them fairly and impartially; and so long as it or they continue to use its position to destroy the rights of plaintiff and the class he represents herein (R. 12-13).

The District Court held that "The Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and William M. Munden and the Norfolk Southern Railway Company have been duly served and are properly before the Court" (R. 50). It thereupon overruled the motions of the Brotherhood and of Ocean Lodge No. 76 to dismiss on the ground of no service of process (R. 50).

It thus appears that the requirements of Federal Rules of Civil Procedure, Rule 23 (a) have been expressly complied

with; that the instant case is typical of the cases brought under said subsection;

See Federal Rules of Civil Procedure and Proceedings of the American Bar Institute, Cleveland, 1938, pp. 50, 263-264;

and that the objections of the respondents to the service of process and the jurisdiction of the Court over the Brotherhood of Locomotive Firemen and Enginemen are frivolous.

CHARLES H. HOUSTON,
Attorney for Petitioner.

JOSEPH C. WADDY,
OLIVER W. HILL,
Of Counsel.

APPENDIX.

FEDERAL RULES OF CIVIL PROCEDURE.

RULE 23. CLASS ACTIONS.

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several; and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.